No. 10-278

In The Supreme Court of the United States

EDUCATIONAL MEDIA COMPANY AT VIRGINIA TECH, INCORPORATED; CAVALIER DAILY, INCORPORATED,

Petitioners,

v.

SUSAN R. SWECKER, COMMISSIONER, VIRGINIA ALCOHOLIC BEVERAGE CONTROL COMMISSION; PAMELA O'BERRY EVANS, COMMISSIONER, VIRGINIA ALCOHOLIC BEVERAGE CONTROL COMMISSION; W. CURTIS COLEBURN, III, CHIEF OPERATING OFFICER, VIRGINIA DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL; FRANK MONAHAN, DIRECTOR, LAW ENFORCEMENT BUREAU OF THE VIRGINIA DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL; ESTHER H. VASSAR, COMMISSIONER, VIRGINIA ALCOHOLIC BEVERAGE CONTROL COMMISSION,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Fourth Circuit erred in applying the framework under *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980), for evaluating a regulation restricting commercial speech dealing with advertisements of alcohol in college newspapers.

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BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

Virginia Attorney General Kenneth T. Cuccinelli, II, on behalf of the state defendants, submits this Brief in Opposition to the Petition for Certiorari.

STATEMENT OF THE CASE

Educational Media is a private non-profit corporation that publishes *Collegiate Times*, a student-run newspaper at Virginia Polytechnic Institute and State University ("Virginia Tech"). (Pet. App. 5a). Copies of the newspaper are distributed on campus, throughout Blacksburg and in neighboring Christiansburg. Approximately 41% of the student readership of the *Collegiate Times* is below the age of 21. (Pet. App. 6a).

The Cavalier Daily is a student-run newspaper at the University of Virginia ("UVa."). (Pet. App. 9a). Copies of the newspaper are distributed on its campus, or "grounds," and in five locations off grounds. (Pet. App. 9a). Approximately 49% of "on-grounds" students are under the age of 21. (Pet. App. 10a). Between 36 to 42% of all UVa. students are under the age of 21. (Pet. App. 10a).

The Cavalier Daily and *Collegiate Times* filed suit challenging a pair of state regulations as invalid under the First Amendment of the United States Constitution. (Pet. App. 1a). Only one of these

regulations remains at issue. The regulation provides that:

> Advertisements of beer, wine and mixed beverages are not allowed in college student publications unless in reference to a dining establishment, except as provided below. A "College student publication" is defined as any college or university publication that is prepared, edited or published primarily by students at such institution, is sanctioned as a curricular or extra-curricular activity by such institution and which is distributed or intended to be distributed primarily to persons under 21 years of age.
>
> Advertising of beer, wine and mixed beverages by a dining establishment in college student publications shall not contain any reference to particular brands or prices and shall be limited only to the use of the following words: "A.B.C. on premises," "beer," "wine," "mixed beverages," "cocktails," or any combination of these words.

3 Va. Admin. Code § 5-20-40(B)(3). These newspapers wish to run alcohol-related advertisements. (Pet. App. 6a-8a, 10a-11a). The lawsuit named members of the Alcohol Beverage Control Board ("ABC Board") and other persons charged with enforcing the regulations.

The United States District Court for the Eastern District of Virginia reviewed the regulation under the four-part intermediate scrutiny test articulated in *Central Hudson Gas & Electric v. Public Service Comm'n*, 447 U.S. 557, 561-62, 564, 566 (1980). The

four requirements to be satisfied are (1) to receive any First Amendment protection, commercial speech "must concern lawful activity and not be misleading"; (2) the government must assert a "substantial" government interest to justify its regulation; (3) the regulation must "directly advance[ ] the governmental interest asserted"; and (4) the regulation must not be "more extensive than is necessary to serve that interest." *Id.* at 566.

The district court concluded that the sale of alcohol is lawful and not misleading. (Pet. App. 29a). The court further concluded that reducing underage and abusive consumption of alcohol represented a substantial governmental interest. (Pet. App. 29a-30a). Turning to the third component of the test, the court held that the regulation was deficient. The court found significant the absence of specific studies showing that underage or abusive drinking would be worse on campus without this regulation. (Pet. App. 39a). The court found unpersuasive the testimony of the ABC Board's expert economist, Dr. Henry Saffer, that college newspapers constitute a unique medium for which there is no substitute. (*Id.*) In the district court's view, "common sense suggests" that other media "might act as a substitute source of far more information to college students than does any newspaper." (Pet. App. 40a). Finally, the district court concluded that the fourth component, the required "narrow tailoring," was not present here. (Pet. App. 44a-45a). The court invalidated the

regulation as facially unconstitutional under *Central Hudson*. (Pet. App. 48a, 57a, 62a-64a).

The district court declined to reach the plaintiffs' alternative argument, namely, that 3 Va. Admin. Code § 5-20-40(B)(3) is unconstitutional because it singles out a "specific segment of the media." (Pet. App. 45a-47a).[1]

The Board appealed to the Fourth Circuit. A divided panel of that court reversed. The Fourth Circuit agreed with the district court concerning the first two parts of the *Central Hudson* test, that the speech at issue was protected by the First Amendment and that the governmental interest in combating abusive and underage drinking was substantial. (Pet. App. 74a-75a).

Turning to the third part of the test, the Fourth Circuit found that "the link between § 5-20-40(B)(3) and decreasing demand for alcohol by college students to be amply supported by the record." (Pet. App. 77a). The court observed that the link between advertising and demand would not justify advertising bans in every situation, but that the link here is strengthened because "'college student

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[1] In *The Pitt News v. Pappert,* 379 F.3d 96 (3rd Cir. 2004) (Alito, J.), a panel of the Third Circuit after finding an advertising bar unconstitutional under *Central Hudson* also concluded that a regulation banning all alcohol advertisements in the newspapers of educational institutions violated the First Amendment because it "unjustifiably imposes a financial burden on a particular segment of the media." *Id.* at 109.

publications' primarily target college students." (*Id.*) The court further noted that it was "counterintuitive for alcohol vendors to spend their money on advertisements in newspapers with relatively limited circulation, directed primarily at college students, if they believed that these ads would not increase demand by college students." (*Id.*) Lastly, the court held that the plaintiffs had not provided any evidence that contradicted this link. (*Id.*)

Finally, the court found that the regulation was narrowly drawn. (Pet. App. 78a). The court reasoned that the regulation was not a complete ban but rather that it only prohibited certain types of advertisements. (Pet. App. 78a-79a). Moreover, the regulation did not ban all publications from advertising, instead it regulates those publications "targeted at students under twenty-one." (Pet. App. 79a). The court upheld the regulation as facially valid and remanded the case for further proceedings. (Pet. App. 80a).

The court expressly declined to address two questions: (1) whether the regulation was unconstitutionally applied to the two plaintiffs in violation of their constitutional rights to engage in commercial speech; and (2) whether the regulation unconstitutionally discriminates against a particular segment of the media. (Pet. App. 72a n.2). Those questions will be addressed on remand. (Pet. App. 72a, 80a).

Judge Moon, sitting by designation, dissented. First, Judge Moon concluded that the regulation did not apply at all to the two plaintiffs. He noted that the parties agree that "a majority of the readership of the [plaintiffs'] newspapers is over the age of twenty-one," and, therefore, the regulation does not apply to them because it is limited to newspapers "'distributed or intended to be distributed to persons under 21 years of age.'" (Pet. App. 80a-81a). Second, Judge Moon disagreed that the regulation satisfied the third and fourth parts of the *Central Hudson* test. In his view, the evidence presented by the Board is "speculative" concerning a reduction in demand by underage persons. (Pet. App. 83a-86a). Furthermore, on the fourth part of the test, he concluded that the regulation was a poor fit between the public policy goals and the restrictions imposed. (Pet. App. 86a-91a).

REASONS FOR DENYING THE PETITION

This case involves only the application of settled law to case-specific facts such that there is no actual circuit split; the case is susceptible to being decided on an independent state ground which has not been definitively decided in the courts of Virginia; the case has been remanded and other alternative federal grounds are unresolved; and even if a circuit split were found to exist it is shallow and not well developed.

I. THERE IS NO SPLIT IN THE CIRCUITS REGARDING THE APPLICATION OF THE *CENTRAL HUDSON* FRAMEWORK.

The plaintiffs argue that certiorari should be granted to resolve a split between *The Pitt News* and the present case. In fact, these two cases constitute fact-specific applications of legal principles to different regulations based on differing evidentiary records. This Court expressly has approved the use of "common sense" in assessing whether a government regulation of commercial speech advances a governmental interest. *See Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 555 (2001) (courts may turn to "history, consensus, and 'simple common sense.'") (citation omitted). Precisely when courts should turn to common sense and when empirical or historical evidence is necessary will depend on case specific considerations. That is what occurred here.

First, the regulation at issue here differs both factually and legally from the regulation at issue in *The Pitt News*. As a factual matter, the Third Circuit found "unsupported by any evidence" the conclusion that "elimination of alcoholic beverage ads from *The Pitt News* and other publications connected with the University will slacken the demand for alcohol by Pitt students." *Id.* at 107. The Court held that Pennsylvania had relied on "nothing more than 'speculation' and 'conjecture'" in its defense of the statute. *Id.* at 107-08. In contrast, in the case at bar, the ABC Board presented evidence from an expert, Dr. Henry Saffer, a professor of economics at Kean

University. (Pet. App. 12a-13a). He concluded that an increase in advertising increases alcohol consumption and, conversely, a decrease in advertising would reduce binge drinking. (Pet. App. 13a). The ABC Board also presented statements from university officials, including the Dean of Students at UVa. and the Director of Judicial Affairs at Virginia Tech, who drew from their experience to conclude that 3 Va. Admin. Code § 5-20-40(B) would assist the universities' overall efforts to combat underage drinking. (Pet. App. 14a-15a). Likewise, the Director of the Center for Alcohol and Substance Abuse Education at UVa. concluded, based on her knowledge and experience, that the regulation will assist the university's efforts to prevent the consumption of alcoholic beverages by students under the age of 21. Unlike the Third Circuit in *The Pitt News*, the Fourth Circuit did not have to engage in "speculation" and "conjecture." Instead, it could find "the link between § 5-20-40(B)(3) and decreasing demand for alcohol by college students to be amply supported by the record." (Pet. App. 77a). The case at bar stands on a different evidentiary footing than the case before the court in *The Pitt News*.

The plaintiffs and their amici depict the Fourth Circuit's decision as ignoring the evidence and resting its decision instead entirely on "common sense." (Pet. 10-13). That is simply not the case. The panel found the link between the regulation and decreasing demand for alcohol by college students to be "amply supported by the record." (Pet. App. 77a). The panel

majority did not purport to rest its conclusions exclusively on "common sense."

Moreover, the regulation at issue in *The Pitt News* was severely overinclusive because it banned all advertising in university publications, even though "more than 75% of the total University population is over the legal drinking age." 379 F.3d at 108. A publication devoted exclusively to graduate students, or even one having faculty members as a target audience, was swept into this broad ban. Here, the regulation is expressly designed to target publications that are "distributed or intended to be distributed primarily to persons under 21 years of age." 3 Va. Admin. Code § 5-20-40(B)(3). Given this difference, the Fourth Circuit did not err in concluding that the regulation was not overbroad "on its face." (Pet. App. 80a). The court expressly did not reach the question of whether the regulation might be unconstitutional as applied to these newspapers. (Pet. App. 72a n.2). In sum, there is no split for this Court to resolve.

II. THIS CASE CONSTITUTES A POOR VEHICLE FOR ADDRESSING THE SCOPE OF THE *CENTRAL HUDSON* TEST BECAUSE A STATE COURT HAS NEVER CONSTRUED THE REGULATION AT ISSUE AND A CONSTRUCTION FAVORABLE TO THE PLAINTIFFS IS POSSIBLE.

"[N]o principle has found more consistent or clear expression than that the federal courts should not adjudicate the constitutionality of state enactments fairly open to interpretation until the state courts have been afforded a reasonable opportunity to pass upon them." *Harrison v. NAACP*, 360 U.S. 167, 176 (1959). No state court has had the opportunity to construe the regulation at issue.

The regulation applies to a university publication "which is distributed or intended to be distributed primarily to persons under 21 years of age." 3 Va. Admin. Code § 5-20-40(B)(3). One of the plaintiffs, *The Cavalier Daily*, distributes its newspaper on the grounds of the University of Virginia and five locations off campus. (Pet. App. 9a). Approximately 49% of "on-grounds" students at UVa. are under the age of 21, and between 36-42% of all UVa. students, both graduate and undergraduate, are under the age of 21. (Pet. App. 10a). As to the other plaintiff, *Collegiate Times*, approximately 41% of its total readership is under the age of 21. (Pet. App. 6a).

The panel majority never reached the question of whether the plaintiffs were even implicated by the

plain language of the regulation. Judge Moon, in his dissent from the panel majority, concluded that

> the regulation, properly construed, does not apply to these newspapers. '[T]he parties agree that a majority of the readership of the college newspapers is over the age of twenty-one,' and the undisputed statistical evidence in the record supports that agreement. More than half of the students at these universities are over the age of twenty-one, as of course are most faculty and staff. Given that a majority of the readership is over the age of twenty-one, these college newspapers, are not 'distributed or intended to be distributed primarily to persons under 21 years of age,' as required to be subject to the strictures of 3 Va. Admin. Code § 5-20-40(B)(3). This case could be resolved on that ground without reaching the broader constitutional question.

(Pet. App. 80a-81a) (citations omitted).

In the view of the ABC Board, the regulation *does* apply to the plaintiffs. A Virginia court, however, may well disagree. Virginia courts "give 'great deference' to an agency's interpretation of its own regulations." *Bd. of Supervisors v. State Bldg. Code Technical Review Bd.*, 663 S.E.2d 571, 574 (Va. Ct. App. 2008). However, "deference is not abdication, and it requires [Virginia courts] to accept only those principles of agency interpretations that are reasonable in light of the principles of construction courts normally employ." *Id. See also Avalon Assisted Living Facilities*

v. Zager, 574 S.E.2d 298, 307 (Va. Ct. App. 2002) (principles of statutory construction apply with equal force "to the interpretation of regulations adopted by an administrative agency. . . ."). Consistent with this Court's jurisprudence, Virginia courts "have a duty when construing a statute [or regulation] to avoid any conflict with the Constitution." *Commonwealth v. Doe*, 682 S.E.2d 906, 908 (Va. 2009) (citing cases). *See also Jeffress v. Stith*, 402 S.E.2d 14, 16 (Va. 1991) ("any construction of a statute or regulation that would make either unconstitutional should be avoided.").

When faced with the question of whether the regulation applies at all to the plaintiffs, a Virginia court may well construe the regulation in a manner that avoids any constitutional objection. If the regulation does not reach the plaintiffs' publications because their publications are not "distributed or intended to be distributed primarily to persons under 21 years of age," 3 Va. Admin. Code § 5-20-40(B)(3), the plaintiffs' constitutional controversy disappears. By the same token, this Court may well conclude the same. *Arizonans for Official English v. Arizona*, 520 U.S. 43, 78 (1997) (in construing state statutes, federal courts apply the "'cardinal principle'" that seeks to "'first ascertain whether a construction . . . is fairly possible' that will contain the statute within constitutional bounds.") (citations omitted).

There is no reason for this Court to grant certiorari when the state regulation at issue has never been construed by a state court, and that

construction may well resolve any controversy involving these plaintiffs. As this Court has noted, a "federal tribunal risks friction-generating error when it endeavors to construe a novel state Act not yet reviewed by the State's highest court." *Id.* at 79. Alternatively, the Court should certify the question to the Supreme Court of Virginia. *Id.* at 79-80. *See also* Va. Sup. Ct. R. 5:42 (providing for procedure of certification of questions of law from this Court to the Supreme Court of Virginia).

III. THE CASE IS INCOMPLETE INASMUCH AS THERE ARE ALTERNATIVE FEDERAL GROUNDS REMAINING FOR DECISION ON REMAND.

Furthermore, the plaintiffs have two arrows remaining in their quiver. The Fourth Circuit expressly declined to examine whether the regulation, although valid on its face, was being unconstitutionally applied to these two plaintiffs. (Pet. App. 72a n.2). Instead, the court limited its holding to the *facial* constitutionality of the regulation. The Fourth Circuit also declined to reach the question of whether the regulation "unconstitutionally discriminates against a particular segment of the media." (*Id.*) Given these unresolved issues that may yet afford the plaintiffs relief, there is no reason for this Court to grant certiorari at this juncture.

IV. EVEN IF THE FOURTH CIRCUIT AND THE THIRD CIRCUIT DIFFER IN THEIR APPLICATION OF THE THIRD AND FOURTH PARTS OF THE *CENTRAL HUDSON* TEST, THE SHALLOWNESS OF THE SPLIT MILITATES AGAINST GRANTING CERTIORARI AT THIS JUNCTURE.

According to the plaintiffs, the approach of the Fourth Circuit conflicts with the Third Circuit's decision in *The Pitt News*. Of course, in the respondents' view, *The Pitt News* and the case at bar constitute fact-specific applications of legal principles to differing regulations, based on a different evidentiary record. This Court expressly has approved of the use of "common sense" in assessing whether a government regulation of commercial speech advances a governmental interest. *See Lorillard Tobacco Co.*, 533 U.S. at 555 (in assessing whether a regulation directly advances the governmental interest asserted, courts may turn to "history, consensus, and simple common sense."). Precisely when courts should turn to common sense and when empirical or historical evidence is necessary will depend on case specific considerations. But even if a split does exist, given the complexity of the issue, there is no reason why the issues should not be permitted to percolate in the lower courts before they reach this Court.

CONCLUSION

For reasons stated above, the Petition for a Writ of Certiorari should be **DENIED**.

Respectfully submitted,

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